No. 2461

In the Supreme Court

OF THE UNITED STATES

October Term, 1942

RESEARCH LABORATORIES, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Circuit Court of Appeals for the Second Circuit

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TO THE HONORABLE, THE SUPREME COURT
OF THE UNITED STATES:

STATEMENT OF THE MATTER INVOLVED

On December 7, 1940, there was filed in the District Court of the United States for the Western District of Washington, Southern Division, an Amended Libel of Information (R. 19-23) by which the United States of America by its above named attorneys of record informed the Court that there was in possession of the Crown Drug Company of

Kansas City, Jackson County, Missouri, 143 packages, more or less, of an article labeled in part "NUE-OVO", stating the showing of an analysis of the article, and alleging that the article is misbranded in violation of the Federal Food, Drug & Cosmetics Act (21 U.S. 352) (a) in that statements appearing in the labeling thereof, viz., in the circulars entitled "What is Arthritis?" accompanying the said articles were false and misleading in that all and singular of the statements therein and the whole thereof created the impression in the mind of the reader thereof that the said article is a competent treatment for arthritis, etc., whereas the said article is not a competent and beneficial treatment for arthritis. Subdivisions numbered IV and V of the said Amended Libel of Information disclosed that the respondent contended that the said circulars accompanied the said article while in interstate commerce, in that a shipment of said circulars from Nue-Ovo, Inc., Chicago, Illinois, were received in interstate commerce by the Crown Drug Company of Kansas City, Missouri, at its warehouse, located at 2110 Central Street in said City, simultaneously with the said article; and that said circulars ("What is Arthritis?") and the shipment of "NUE-OVO" were placed, then and there, in the same room of the said warehouse for distribution to retail stores of the said Crown Drug Company, Kansas City, Missouri,. That said circulars accompanied packages of "NUE-OVO" in the said retail Crown Drug Stores

and were prominently displayed in the said stores in the same rooms and in close proximity to the said packages of "NUE-OVO" and that said circulars were distributed to persons, that is, members of the public who appeared in said drug stores.

Said Amended Libel of Information prayed that process issue directing the U. S. Marshal for the Western District of Missouri to seize said shipment of Nue-Ovo for condemnation, etc.

On the 18th day of December, 1940, the petitioner, Research Laboratories, Inc., as intervenor, filed Exceptions to the said Amended Libel (R. 23-24). By these Exceptions it is contended that the Amended Libel failed to state in what particulars the labeling was claimed to be false and misleading, and what particular statements were claimed to be false and misleading. The intervenor asked that the libelant be required to amend the Libel to disclose the particular statements claimed to be false and misleading and the particulars in which it was claimed that the labeling was false and misleading. Said exceptions also set forth the contention that the Amended Libel failed to state how and in what manner the circular "What is Arthritis?" is claimed to have accompanied the said article. As a third exception the intervenor stated that the Amended Libel fails to state facts sufficeint to constitute a cause of action.

On the 2nd day of June, 1941, the said Court in which said proceeding was filed entered its "Order Sustaining Exceptions to Amended Libel and Order of Dismissal" (R. 25-26), by which it was held that the Third Exception of the intervenor to the Amended Libel, upon the ground that the Amended Libel fails to state facts sufficient to constitute a cause of action should be sustained and the said action dismissed, and allowing an exception.

Thereafter respondent, as appellant, appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the said judgment and decree in the said District Court, and such proceedngs were thereafter had that on the 24th day of February, 1942, there was filed in said Circuit Court of Appeals a decree (R. 66-67) by which the said Order of Dismissal of the said District Court was reversed upon the grounds stated in an opinion of Circuit Judge Matthews of said Circuit Court of Appeals (R. 60-66) in which opinion the contentions of the parties were stated and in which the Court held that in substance the Amended Libel stated that the 143 packages of Nue-Ovo and the printed circulars containing alleged false and misleading statements concerning Nue-Ovo were both shipped from Chicago, Illinois to Kansas City, Missouri, that all of the packages and all of the circulars were so shipped by a single shipper (Nue-Ovo, Inc.) to a single consignee (Crown Drug Co.) and were received by said consignee simultaneously in inter-

state commerce and that while the Libel did not state whether the packages and the circulars did or did not travel in the same crate, carton or other container or on the same train, truck or other vehicle during their interstate journey, such matter was immaterial. That in view of the fact that the packages and the circulars had a common origin and a common destination and arrived at their destination simultaneously it should be held that they accompanied each other regardless of whether, physically, they were together or apart during the journey. With reference to the contention of the petitioner that the circulars constituted advertising and, therefore, did not constitute labeling within the meaning of the Act the Circuit Court of Appeals held that the assumption that printed matter (such as circulars) cannot constitute both advertising and labeling is unwarranted. The Court also held that there was no merit in the appellee's contention that the Libel did not specifically charge that the circular entitled "What is Arthritis?" is false and misleading.

(For Copy of Contents of Pamphlet see R. 15-16)

Thereafter, and to-wit on April 2, 1942, an order was entered in the said Circuit Court of Appeals denying the Petitioner's Petition for Rehearing (R. 66-67).

Subsequently an Order was made by the Honorable Justice William O. Douglas granting the peti-

tioner to and including the 1st day of August, 1942, within which to file this PETITION FOR WRIT OF CERTIORARI.

There are two questions that the petitioner feels should be determined by this Court in this case and each involves the definition of a single word as the same is used in Sec. 201 (m) of the Federal Food, Drug & Cosmetic Act (21 U.S.C., Sec. 321 (m)). One is the correct definition to be given the word "labeling" as that word is defined in the Act and the other is the correct definition to be given the word "accompanying" as that word is employed therein. In other words, it is the contention of the petitioner that the term "labeling" as used and defined in the Act does not include an advertising circular, the mis-use of which comes directly within the purview of the authority and jurisdiction given the Federal Trade Commission; and that the history and reasonable construction of the Act upon which the Libel in this case is predicated discloses that the Congress of the United States specifically eliminated from the authority and jurisdiction of the Pure Food and Drug Division of the Department of Agriculture purely advertising matter.

The other contention to be disposed of is that inasmuch as the printed circulars were not in any way enclosed at any time in interstate commerce with the packages of Nue-Ovo, nor in any way attached thereto, during their progress in interstate commerce, there was no "accompanying" within the

meaning of that term as used in the said Federal Food, Drug and Cosmetic Act.

The decision which the petitioner desires reviewed is a decision and judgment of a Circuit Court of Appeals and is subject to review by the Supreme Court of the United States under Sec. 240, Judicial Code, 28 U.S.C.A., No. 347.

The questions presented by this petition have been necessarily included in the summary and short statement of the matter involved, above set forth.

The reasons relied on by the petitioner for the allowance of the Writ are as follows:

1. The Circuit Court of Appeals in this case has decided an important question of Federal Law which has not been, but should be, settled by the Supreme Court of the United States; and the said question has been decided in a way which the petitioner feels is probably in conflict with applicable decisions of the said Supreme Court.

2. That the said matter decided by the Circuit Court of Appeals has been otherwise decided by at least two Judges of District Courts of the United States, to-wit, the decision in this case by Honorable Lloyd L. Black, Judge of the District Court of the United States for the Western District of Washington and the decision of the Honorable F. Ryan Duffy, Judge of the District Court of Wisconsin, in the case of United States of America vs. Royal Lee, 40 Fed. Sup. 801.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari may be issued out of and under the seal of this Court, directed to the United States Circuit Court of Appeals for the Ninth Circuit, commanding the said Court to certify and send to this Court, on a day certain to be therein designated, a full and complete transcript of the record and proceedings of said Circuit Court of Appeals in said case, entitled United States of America, Appellant, vs. Research Laboratories, Inc., Appellee, to the end that the said case may be reviewed and determined by this Court as provided by Sec. 240, Judicial Code, and that your petitioner may have such other and further relief or remedy as this Court may deem appropriate and in conformity with the said Judicial Code, and that the said judgment in the said Circuit Court of Appeals in the said case and every part thereof may be reversed by this Honorable Court.

RESEARCH LABORATORIES, INC.,
Petitioner.
ALEXANDER G. BARRY,
Attorney for Petitioner.

HARRY G. HOY
Of Counsel for Petitioner.

CERTIFICATE

We hereby certify that the foregoing Petition is, in our opinion, well founded, and that it is not interposed for delay.

ALEXANDER G. BARRY,
Attorney for Petitioner.

HARRY G. HOY,
Of Counsel.